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Supreme Court of the United States
OCTOBER TERM, 1942

No. 498

GALBAN LOBO COMPANY, S. A.

Petitioner,

vs.

LEON HENDERSON, Price Administrator,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES EMERGENCY COURT OF AP-
PEALS AND BRIEF IN SUPPORT THEREOF.**

**DONALD MARKS,
JULIUS B. BAE?,
ELI D. GOLDSMITH,**
Counsel for Petitioner.

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UNITED STATES EMERGENCY COURT OF APPEALS**

*To the Honorable Harlan Fiske Stone, Chief Justice of the
United States, and to the Associate Justices of the Su-
preme Court of the United States:*

The above named petitioner, by the undersigned, its attorneys, respectfully prays that a Writ of Certiorari to the United States Emergency Court of Appeals may issue to review the judgment of that Court made upon the 30th day of September, 1942, in the above mentioned cause.

Statement of Proceedings in Court Below.

This cause arose under the provisions of Sections 203 and 204 of The Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress, Second Session, approved January 30, 1942). Petitioner, on March 2, 1942, filed with the Office of Price Administration a petition for exception to Price Schedule No. 16, as amended, pursuant to Section 203(a) of the Emergency Price Control Act (Tr. 1-13). On May 12, 1942, the Price Administrator issued an order

dismissing said petition upon jurisdictional grounds (Tr. 16, 17).

Petitioner thereafter filed its complaint against the Price Administrator in the United States Emergency Court of Appeals protesting said order of dismissal (Tr. 1-15). On September 30, 1942, the United States Emergency Court of Appeals rendered its decision dismissing petitioner's complaint upon the ground that the provisions of the Emergency Price Control Act of 1942 relating to protest and review are not available to a person whose complaint is based upon a transaction completed prior to the time the Act became law. The Court held that questions arising under the Price Schedules issued under the authority of Executive Order prior to the enactment of the Price Control Act are not subject to the protest and review procedure provided by the Act.

Statement of Opinion Below.

The opinion of the United States Emergency Court of Appeals is not yet officially reported. A copy thereof is set forth at length in the Record.

Jurisdiction.

The judgment of the United States Emergency Court of Appeals was entered on September 30, 1942. The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942.

Summary Statement of Matter Involved.

On October 27, 1941, petitioner entered into a contract with Imperial Sugar Company, of Sugar Land, Texas, for the sale of 4,000 tons of Cuban raw sugar (Tr. 11-13). Said contract was amended on December 8, 1941 to provide that

the seller should have the "option of calling the price on any one day on or before January 31, 1942 at the Cuban equivalent of the ceiling price established by the O.P.A. on the date of call" (Tr. 14). It was also provided in the December 8th amendment that shipment of the sugar should be effected by the seller during December, 1941, instead of "December 1941/January 1942", as previously provided (Tr. 14).

Shipment of the sugar was made by petitioner during the month of December, 1941, as provided, and two vessels carrying an aggregate of 4,000 tons arrived at Galveston, Texas, on December 17, 1941 and January 2, 1942, respectively (Tr. 5).

Price Schedule No. 16 was issued by the Price Administrator on August 13, 1941 (Tr. 18-21). On January 5, 1942, the ceiling price of raw sugar was raised by an amendment of Section 1134.9 of Revised Price Schedule No. 16 from 3.48¢ per lb. duty paid, cost and freight, to 3.73¢ per lb. duty paid, cost and freight, on deliveries made to Gulf ports (Tr. 26, 27).

Petitioner had contracted to purchase the sugar in question in Cuba upon similar terms providing that its seller should have the option of calling the price at any time up to January 31, 1942 (Tr. 4). Petitioner's seller called the price on January 15, 1942, and petitioner was obliged to pay the Cuban equivalent of the then prevailing ceiling price which, computed cost and freight Galveston, Texas, was 2.98¢ per lb., less 1/2 of 1% which was the margin of petitioner's expected profit on the transaction (Tr. 5).

Petitioner then called the price to Imperial Sugar Company on the same basis (as provided in the contract of sale), namely, 2.98¢ per lb. (Tr. 5).

Imperial Sugar Company refused to pay the price as called by petitioner, claiming that under Amendment #3 of

Price Schedule No. 16 petitioner was limited to the maximum price prevailing on the dates of the arrival of the sugar at quarantine, namely, December 17, 1941, and January 2, 1942, both of which dates were prior to the increase in the ceiling price above referred to (Tr. 5). The difference in price thus resulting amounted to 40¢ per cwt., leaving petitioner with a net loss on the 4,000 tons of sugar of \$36,916.41 (Tr. 5, 6).

Petitioner thereupon filed its petition with the Price Administrator setting forth the foregoing facts, pointing out that Imperial Sugar Company was unjustly enriched, and requesting an exception to Price Schedule No. 16 permitting it to demand and permitting Imperial Sugar Company to pay on the basis of the Cuban equivalent of the ceiling price prevailing on January 15, 1942 (Tr. 6, 7).

The order of the Administrator dismissing the petition followed (Tr. 16, 17).

Petitioner thereupon duly filed its complaint with the United States Emergency Court of Appeals, which court has dismissed the complaint for the reason above stated.

Principal Questions Presented.

1. Are the protest and review provisions of the Emergency Price Control Act of 1942 available to a person whose complaint was based upon a transaction completed (except for payment) prior to the time the Act became law?

2. Did the United States Emergency Court of Appeals properly dismiss the complaint in this case?

Statute, Regulations, Order and Schedules Involved.

The pertinent statute and regulations will be found in the Appendix (*infra*, pp. 15-17). The pertinent order and schedules will be found in the Record (Tr. 18-40).

Reasons for Granting Writ of Certiorari.

This case involves an important question of construction of the Emergency Price Control Act of 1942. It is the first case to have been decided by the United States Emergency Court of Appeals; and the question of jurisdiction to apply the remedial provisions of the Act to issues arising under the Price Schedules promulgated prior to the enactment of the law requires a determination of Congressional purpose as expressed in the Act.

I.

The Court below has erroneously construed the Emergency Price Control Act of 1942.

In dismissing the complaint the Court below held that the protest and review provisions of the Act are not applicable to any transaction which occurred under Price Schedules deriving their effect from Executive Order. The Court construed Section 206 of the Act as giving life to Price Schedules theretofore issued, but only from the date when such Price Schedules should become effective by re-printing in the Federal Register. This date became February 11, 1942.

The Court construed Section 206 as limiting the effectiveness of such republished Price Schedules to the period after February 11th. The Court, therefore, reasoned that the provisions for protest and review, being limited to "such Price Schedules", apply only with respect to matters arising under such Price Schedules after February 11th.

The Court observed that if Congress had wanted to provide for the review of issues arising under the old Price Schedules in accordance with the procedure provided in the Act, it would have said so specifically.

The Court said, in passing, that petitioner was not foreclosed from any remedy that was open before the Emergency Price Control Act of 1942 was enacted.

This construction of the law and the reasoning upon which it is based appear to petitioner to be contrary to the intention of Congress as expressed in the Act.

Petitioner's argument in this connection will be found in detail in the accompanying brief.

CONCLUSION.

For the reasons indicated above, as elaborated in the brief annexed hereto, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Emergency Court of Appeals to the end that this cause may be reviewed and be determined by this Court, and that the judgment of the Emergency Court of Appeals may be reversed, and that your petitioner, Galban Lobo Company, S. A., may have such further and other relief as this Court may deem proper in the premises.

Respectfully submitted,

BAER & MARKS

By DONALD MARKS
Attorneys for Petitioner.

Dated, New York, N. Y., October 24, 1942.

Of Counsel:

DONALD MARKS,
JULIUS B. BAER,
ELI D. GOLDSMITH.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

DONALD MARKS, being duly sworn, deposes and says: That he is a member of the firm of Baer & Marks, maintaining offices at 20 Exchange Place, Borough of Manhattan, City and State of New York; that he is a member of the bar of the Supreme Court of the United States and is an attorney for Galban Lobo Company, S.A., which was the plaintiff in the proceeding before the United States Emergency Court of Appeals in the above entitled matter; that he makes this verification on behalf of Galban Lobo Company, S.A., as petitioner herein; that affiant has read the foregoing petition, was the attorney for said plaintiff Galban Lobo Company, S.A. and has knowledge of this litigation; that the matters stated in said petition are true to the best of his knowledge, information and belief; that the foregoing petition is well founded and entitled to a favorable consideration of this Court and that it is not interposed for the purpose of delay.

DONALD MARKS

Subscribed and sworn to
before me this 26th day
of October, 1942.

[SEAL]

ROSE HOFFMAN

Notary Public, Kings County
Kings Co. Clk's No. 402 Reg. No. 3106
N. Y. Co. Clk's No. 317 Reg. No. 3D214
Commission Expires March 30, 1943